

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WILLARD RUSSELL COX,

Defendant-Appellee.

UNPUBLISHED

January 29, 2008

No. 277978

Alger Circuit Court

LC No. 05-001717-FH

Before: Davis, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant has been charged with two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c (multiple variables and victim under 13 years old). Plaintiff appeals by leave granted from an order¹ granting defendant's motion to reconsider an earlier order in limine² barring defendant's introduction of evidence regarding allegations of CSC by one or more other members of the complainants' families.³ We affirm.

At the hearing on the motion to reconsider, plaintiff argued that the evidence at issue was not relevant, while on appeal it raises the additional argument that MRE 608 and MRE 609 do not permit admission of the evidence. Opposing admission of evidence on one ground does not preserve the issue for appeal on a different ground. *City of Westland v Okopski*, 208 Mich App

¹ The order was entered by Alger Circuit Judge Garfield W. Hood, sitting by assignment.

² The initial order was entered by Judge Charles H. Stark. On August 8, 2006, defendant pleaded no contest to two counts of CSC II. At sentencing, Judge Stark denied that there had been a *Cobbs* agreement, *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), and sentenced defendant to concurrent prison terms of 29 months to 15 years. Defendant appealed and this Court remanded with instructions to "either impose sentence in accordance with the plea agreement that was placed on the record or allow the defendant to withdraw his plea." *People v Cox*, unpublished order of the Michigan Court of Appeals, entered October 25, 2006. On remand, defendant's plea and sentence were set aside, and Judge Stark disqualified himself, resulting in the reassignment to Judge Hood.

³ Defendant is the step-grandfather of the two minor complainants.

66, 72; 527 NW2d 780 (1994). Accordingly, plaintiff's relevance argument is preserved, while its argument predicated on MRE 608 and 609 is unpreserved.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Review of an unpreserved argument is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Thus, it "is evidence that is material . . . and has probative force" *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). Materiality does not require that evidence be "directed at an element of a crime or an applicable defense," but only that the issue "is within the range of litigated matters in controversy." *Id.*

It is important to remember the posture in which the issue on appeal has been raised. Here, the trial court reversed an earlier pre-trial ruling barring admission of the evidence; the court has thus ruled that the evidence can be offered, but has not ruled that it will be admitted. The ruling now challenged simply put the parties in the same position they were in before plaintiff's motion in limine. Defendant advances several theories in support of relevance. However, the ultimate determination of relevance is subject to the development of a foundation for that relevance at trial, which will be predicated on the theories and proofs advanced. If there is any basis upon which the evidence might be relevant, the court cannot be said to have abused its discretion by removing the bar to its admission.

Defendant's argument in favor of admission is focused on the issue of delayed reporting. In this case, there are two periods of delay: (1) the delay in the complainants reporting the matter to their parents, and (2) the delay in the parents reporting the matter to the police. Defendant appears to be advancing the defense that the charges are either outright fabrications or that the reporting of the alleged abuse has in some way been altered (either by coaching, through a subconscious process of transference, or by a change in perspective as to the validity of the charges). In essence, defendant is arguing that any benign explanation for the two delays is less probable than it would be in light of this evidence. These are plausible bases for admission. The trial court's decision that the evidence should not be barred at this juncture was not an abuse of discretion.

As for plaintiff's unpreserved arguments based on MRE 608 and 609, it has failed to show plain error. On this record, we fail to see how either of these rules constitutes an absolute bar to the admission of the evidence. Plaintiff is free to develop these arguments on remand, when the admissibility of the evidence is finally determined at trial.

Plaintiff also notes that the motion for reconsideration was heard despite the bar presented by the 14-day rule in MCR 2.119(F)(1). However, plaintiff does not specifically challenge the court's ruling on the basis that the 14-day provision was violated. Indeed, plaintiff has not presented this argument in its statement of questions presented. See *Ghaffari v Turner Constr Co*, 259 Mich App 608, 614 n 2; 676 NW2d 259 (2003), rev'd on other grounds 473

Mich 16 (2005) (“Ordinarily, we need not address arguments not raised in a party’s statement of questions presented.”). In any event, the 14-day provision is not a bar to a trial court revising rulings made in an ongoing case, and, in the instant case, once the case was reassigned and Judge Hood was in the position of presiding over the trial, it was not improper for him to grant reconsideration of the earlier motion in limine as if he were reconsidering his own ruling in response to the request filed by substitute counsel.

Affirmed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Helene N. White